UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

In Re: Case No. 03-47913
Chapter 13 Case

Larry J. Foster

Debtor(s).

MEMORANDUM IN OPPOSITION TO OBJECTION TO CONFIRMATION AND MOTION TO CONVERT

The Chapter 13 Trustee has objected to confirmation of the Debtor's Plan in this case and has moved to convert this action to a Chapter 7 case. Some concerns about the Debtor's Plan are being resolved by the Debtor's filing of two tax returns and his application to extend his Chapter 13 Plan. However, the central argument in the motion of the Chapter 13 Trustee deals with a second mortgage with Conseco Finance Loan Company that his new wife attached to the Debtor's home without his knowledge.

This mortgage was secured by the Debtor's new wife without his knowledge, based upon a Power of Attorney that he had executed while in prison, sick and undergoing treatment for cancer. She received and applied the proceeds of the loan. Evidently defective in form, the mortgage was not filed by Conseco. At the time of the Chapter 13 petition, the mortgage still had not been filed and therefore was subject to avoidance under the Trustee's "strong-arm" powers set forth in 11 U.S.C. Section 544. The Trustee regards the value of this avoidable unrecorded mortgage as nonexempt. However, the Debtor exempted the entire value of his homestead, except for the portion encumbered by his first mortgage. The legal question thus is

whether the Debtor may exempt the value of this avoidable unrecorded mortgage under 11 U.S.C. Section 522(g).

DISCUSSION OF FACTS

This Chapter 13 action was filed on November 11, 2003. The Debtor's sources of income are a disability pension and Social Security Disability payments. (He has been incarcerated and his Social Security payments are held in abeyance until he has completed his stay in a halfway house.) His Chapter 13 Plan initially called for him to pay $100 per month for 36 months. However, his listed non-exempt assets total $4,990, so he has proposed an amended Plan to extend his period of payments to 56 months.

Mr. Foster owns a home at 8432 Dupont Avenue North in Brooklyn Park, Minnesota, where he has lived since about 1989. His home is subject to a first mortgage.

From about September 2000 to October 2001 and April 2002 to February 2004, Mr. Foster was in the custody of the Minnesota Department of Corrections. During the period of approximately December 2000 to October 2001, he was housed at the Correctional Facility in Faribault, Minnesota.

In about January 2001 Mr. Foster was diagnosed with non-Hodgkin's lymphoma, a form of cancer that is often fatal. He underwent surgery on about January 22, 2001. An incision came loose, causing internal bleeding and other problems, and required surgery again in about mid-February 2001. During this period, he was suffering significant pain from his operations and was receiving pain-relieving drugs including morphine and Tylenol-3. He believes that his mental capacity and his powers of understanding and concentration were limited by his pain, the drugs he was receiving, and his fears of death.

When he was in the hospital at Faribault, recovering from his first surgery and before his

second surgery, his fiancée Linda Kay Green-Jones presented to him a Power of Attorney, which he signed. He believes he was receiving morphine at the time. His primary concern at the time was the potential disposition of his body, if he were to pass away. He was not aware that it permitted her to sell or mortgage his home.

Soon afterwards, the two of them were married. In June of 2002, while Mr. Foster was incarcerated, his new wife took out a $62,000 loan with Conseco, in her own name. Mr. Foster was not a party to the loan, and he did not even know that it had taken place. However, as his attorney-in-fact, his new wife signed his name to a mortgage deed which encumbered his home to secure the mortgage. The mortgage documentation had a number of defects and was never filed.

Mr. Foster discovered in about October or November of 2002 that his wife had entered into this second mortgage on his home. She had a significant gambling problem. He retracted the Power of Attorney in December of 2002. Shortly thereafter, she filed a Chapter 7 bankruptcy. She received a discharge of over $145,000 in consumer debt.

ARGUMENT

I. The trustee may avoid Conseco's lien on the property.

It is not disputed, at least between the Debtor and the moving party (the Chapter 13 Trustee), that the Trustee may avoid Conseco's lien in the Debtor's home. 11 U.S.C. Section 544(a) provides:

> **(a)** The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by--
> **(1)** a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial

lien, whether or not such a creditor exists;
(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or
(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

In turn, the property associated with the lien avoided under Section 544(a) is preserved for the benefit of the bankruptcy estate under Section 551, which states:

> Any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or any lien void under section 506(d) of this title, is preserved for the benefit of the estate but only with respect to property of the estate.

II. Since the trustee may avoid Conseco's mortgage on the property, the Debtor may avoid Conseco's mortgage on the property.

Even if the trustee were not to act to avoid Conseco's lien in the property, it is clear that the Debtor could do so. 11 U.S.C. Section 522(h) permits the Debtor to exercise certain of the Trustee's avoiding powers, including those under Section 544:

> **(h)** The debtor may avoid a transfer of property of the debtor or recover a setoff to the extent that the debtor could have exempted such property under subsection (g)(1) of this section if the trustee had avoided such transfer, if--
>
> **(1)** such transfer is avoidable by the trustee under section 544, 545, 547, 548, 549, or 724(a) of this title or recoverable by the trustee under section 553 of this title; and
>
> **(2)** the trustee does not attempt to avoid such transfer.

The Trustee has suggested her intention to avoid Conseco's lien in the property. If she were not to do so, the Debtor would.

III. The Debtor may exempt his entire equity in the premises, including the part covered by the avoidable lien.

Finally, the debtor may not only avoid the lien, but may exempt the property to which the

avoided lien would have applied. Section 544(g) provides:

> **(g)** Notwithstanding sections 550 and 551 of this title, the debtor may exempt under subsection (b) of this section property that the trustee recovers under section 510(c)(2), 542, 543, 550, 551, or 553 of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if--
>
> **(1)** **(A)** such transfer was not a voluntary transfer of such property by the debtor; and
>
> **(B)** the debtor did not conceal such property; or
>
> **(2)** the debtor could have avoided such transfer under subsection (f)(2) of this section.

Here, Section 544(f)(2) does not apply and therefore Section 544(g)(2) does not apply. However, since the debtor revealed the property in his schedules, Section 544(g)(1) does apply to permit him to avoid the mortgage. This is for two reasons. First, the mortgage is not a "transfer." And second, it was not "voluntary."

A. The mortgage was not a transfer.

The Court in *In re Posoff*, 1992 WL 237405, attached (Bankr.E.D.Pa. 1992), addressed the issue of which of two events constituted the "transfer" as to which the test of "voluntariness" is applied. The Debtors had executed a Guarantee and a Mortgage to secure the Guarantee; later, when the Debtors defaulted, the guarantor recorded the Mortgage as permitted by the Guarantee. The Court had no trouble finding that the recordation of the mortgage was the action that accomplished the transfer. Therefore, the Court held that the mortgage was involuntary, voidable, and subject to exemption by the Debtor.

Similarly, the Court in *In re Hawley*, 54 B.R. 49 (W.D.Pa. 1985), arrived at the same result. There, the debtor had voluntarily transferred a security interest in an automobile, but the security interest was not recorded and therefore remained unperfected. The Court stated:

> The only transfer by a debtor which bars his exemption rights is a transfer of the property, not the attempted creation of a security interest therein, valid or invalid.

The Court therefore held that the security interest was void and that the debtor was entitled to exercise his exemption to the vehicle.

The analogy of these cases to this situation is clear. Here, the Debtor executed a Power of Attorney. Even assuming that the Power of Attorney itself can be regarded as having been voluntarily executed, it did not transfer or encumber the property. Only the execution of a mortgage document did that, and the Debtor did not execute the mortgage in this case or even know that it had been issued.

B. The mortgage was not voluntary on the part of the Debtor.

As discussed above demonstrates, the debtor did not sign the mortgage and did not even know that it was occurring. To the degree that the mortgage resulted from the debtor's execution of a power of attorney, even power of attorney did not involve a voluntary transfer of the Debtor's rights to his home. He was in pain, drugged and in fear for his life. His primary thought was that he was ensuring the proper disposition of his body. To the degree he thought about his property, he thought he was transferring to his fiancée the power to manage his property on his behalf. He did not think that he was authorizing self-dealing by his attorney-in-fact, or empowering her to mortgage his home without even consulting him.

In a number of cases similar to this, Courts have recognized that a document transferring property that was actually signed by a debtor may not be a "voluntary" transfer under the terms of Section 522(g). For example, transfers knowingly made under legal compulsion or the threat of legal action are not voluntary. See *In re Ross*, 1997 WL 331830 (Bankr.E.D.Pa. 1997), attached. As the Court stated in *In re Davis*:

> In addition, courts recognize that an involuntary transfer of property may occur under circumstances that, although not beyond the debtor's control, involve fraud, material

> misrepresentation or coercion. According to this standard, a "voluntary" transfer occurs, when a debtor, with knowledge of all essential facts and free from the persuasive influence of another, chooses of her own free will to transfer property to the creditor. A voluntary transfer does not occur where a creditor has harassed, insulted, and shamed a debtor into transferring the property to a creditor. Nor has a voluntary transfer occurred where a creditor has concealed or failed to inform a debtor of the essential facts necessary for the debtor to make an intelligent decision on whether to transfer the property to the creditor. This is especially true where a debtor can show that she would not have made the transfer had she been informed of all the essential facts. *In re Reaves,* 8 B.R. 177, 181 (Bankr.D.S.D.1981) (emphasis supplied). *See also Corwin,* 135 B.R. at 924; *In re Hoffman,* 96 B.R. 46, 47-48 (Bankr.W.D.Pa.1988); *In re Seidel,* 27 B.R. 347, 352 (Bankr.E.D.Pa.1983).

Here, the Debtor certainly did not understand the essential facts necessary for him to have transferred to his fiancée the right to mortgage or sell his home. Insofar as his power of attorney did so, it was not voluntary, and he was exempt the underlying property.

IV. This case should not be converted to a Chapter 7.

As indicated above, the debtor is entitled to exempt his entire homestead equity, including any part that would have been encumbered by the avoidable second mortgage in this matter. However, if this were not the case, he would still be entitled to exercise his right to dismiss this case under 11 U.S.C. Section 1307 (b), and he should be given that opportunity.

Dated: May 5, 2004

Respectfully submitted,

UAW Legal Services Plans

by /e/ Randall Smith
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Only the Westlaw citation is currently available.

United States Bankruptcy Court, E.D. Pennsylvania.

In re Richard E. & Susan B. POSOFF, Debtors.
Richard E. & Susan B. POSOFF, Plaintiffs,
v.
Fred D'IMPERIO, Defendant.

Bankruptcy No. 92-11952S.
Adversary No. 92-0674S.

Sept. 21, 1992.

Joan S. Lavery, Kasen, Kasen & Braverman, Cherry Hill, N.J., for debtors.

Donna Cettei, Haddonfield, N.J., for defendant.

Christine C. Shubert, Tabernacle, NJ (Trustee).

Frederic Baker, Ass't. U.S. Trustee, Philadelphia, Pa. (U.S. Trustee).

MEMORANDUM

DAVID A. SCHOLL, Bankruptcy Judge.

***1** Before the court is a Motion ("the Motion") of RICHARD E. POSOFF ("Posoff") and SUSAN B. POSOFF ("Susan") (collectively Posoff and Susan are referenced as "the Debtors"), the Plaintiffs in this proceeding, based upon 11 U.S.C. § 547(b) (avoidance of preferential transfers) for summary judgment. We are able to decide this Motion favorably to the Debtors and enter an Order granting a judgment avoiding the transfer in issue on September 21, 1992, the day prior to the trial of September 22, 1992, for reasons set forth in the accompanying Memorandum.

The Debtors filed a voluntary joint Chapter 7 bankruptcy case on April 2, 1992. FRED D'IMPERIO ("the Defendant") filed both a secured and an unsecured claim in this case, both in the amount of $30,000, on June 24, 1992. After a meeting of creditors on May 8, 1992, the Trustee, CHRISTINE C. SHUBERT, ESQUIRE ("the Trustee"), filed a Report indicating that the Debtors had no assets available for administration. A Discharge of the Debtors was entered on July 13, 1992.

On the following day, July 14, 1992, this proceeding was filed. The trial was scheduled on September 22, 1992. The Defendant answered the Complaint on August 17, 1992. The Motion before us was filed on September 2, 1992. When the Motion was brought to our attention on September 11, 1992, we entered an Order requiring the Defendant to respond to it by September 18, 1992, since the trial was imminent.

In his Brief in Opposition to Motion for Summary Judgment, the Defendant recites the essential facts as follows:

> On or about December 9, 1985, AAA Electronics Corporation, (hereinafter "AAA"), A Pennsylvania Corporation, executed several Promissory Notes in favor of [the Defendant] in an amount in excess of $200,000. On or about December 9, 1985, [Posoff] guaranteed repayment pursuant to a Guaranty Agreement and likewise executed on said date a Mortgage to secure said Guaranty, which Mortgage covered his residence located at 5 Apple Tree Court, Philadelphia, Pennsylvania, 19106 ["the Premises"]. [FN1]
>
> FN1. It is not clear whether this residence is now owned by Posoff alone or by the entireties with Susan. Any conveyance including Susan would of course be subject to the Defendant's mortgage. We are entering judgment in favor of both Debtors because of the possibility that Susan, as well as Posoff, has an ownership interest in the Premises.
>
> The aforesaid obligation arose from a business transaction where [the Defendant] sold his business to AAA. During the transaction, [the Defendant] was represented by legal counsel, Malcolm Trobman, Esquire.
> All but approximately $30,000 of the Notes was paid prior to default and when [the Defendant] proceeded to enforce the Mortgage, he discovered that it had never been recorded by counsel. Once the error was discovered, the Mortgage was immediately filed on March 5, 1992.

In their Complaint, the Debtors contend that the Mortgage, having been recorded within 90 days of their bankruptcy filing, can be avoided pursuant to 11 U.S.C. § 547(b). The Debtors further allege that they can invoke 11 U.S.C. § § 522(h), (g)(1) to exercise the Trustee's avoidance powers under 11 U.S.C. § 547(b).

The Defendant raises three issues in defense: (1)

Posoff did not exhibit "favoritism" towards the Defendant in the entry of the Mortgage; (2) The "transfer" represented by the Mortgage was effectively made when the Guaranty was executed in 1985, not when the Mortgage was recorded on March 5, 1992; and (3) The Debtors are not entitled to utilize 11 U.S.C. § § 522(h), (g)(1) because the transfer was not "involuntary." We conclude that all of these defenses must be rejected as a matter of law.

***2** The first defense confuses the policy underlying § 547 with the terms of that Code section itself. Although avoiding favoritism may be a purpose of § 547(b), the Code does not include the subjective intent of the transferor-debtor to favor the transferee as an element for success under that Code section. We cannot read any such requirement into the Code if Congress has not put it there. *See, e.g., Patterson v. Shumate,* 112 S.Ct. 2242, 2246-47, 2250-51 (1992); and *Taylor v. Freeland & Kronz,* 112 S.Ct. 1644, 1648-49 (1992). The defense of the absence of the Debtors' intent to favor the Defendant must therefore be rejected.

Secondly, we rather easily conclude that the recording of the Mortgage, on March 5, 1992, is an avoidable "transfer" of a portion of the Debtors' interests in the Premises to the Defendant. Although the latter date may be the date of "only" the perfection of the indebtedness, that date is nevertheless the significant date for determining when the transfer effected by the recording of the Mortgage itself occurred. *See In re Nelson Co.,* 959 F.2d 1260, 1264-65 (3d Cir.1992); and *In re Continental Country Club, Inc.,* 108 B.R. 327, 330-31 (Bankr.M.D.Fla.1989). *Cf. Barnhill v. Johnson,* 112 S.Ct. 1386, 1389-91 (1992) (for purposes of § 547(b), a "transfer" of check does not occur until check is honored).

The Defendant acknowledges the broad definition of "transfer" included in 11 U.S.C. § 101(50); and 11 U.S.C. § 547(e)(1)(A), which provides that a "transfer" of real property is perfected only when the rights of a hypothetical bona fide purchaser of the real property are cut off.

Both of these Code sections merely solidify the Debtors' position. The recording of the Mortgage certainly effected a parting of the Debtors with an interest in the Premises. It is clear that the purpose of recording the Mortgage was to attempt to cut off rights of bona fide purchasers contrary to the Defendants' interests, thus making clear that the recording is the significant act for determination of when a Mortgage is transferred.

It might be added that it is questionable whether the recording of this particular Mortgage would have cut off the rights of any bona fide purchaser, since it was recorded long after it was executed by Posoff. *See* 21 P.S. § § 351, 444, 621; *In re Capital Center Equities,* 137 B.R. 600, 608-10 (Bankr.E.D.Pa.1992); and *In re Rice,* 133 B.R. 722, 725-26 (Bankr.E.D.Pa.1991) ("*Rice II* "). However, to the extent that the ineffectiveness of the recording of the Mortgage places the transfer outside of the scope of § § 547(b), (e)(1)(A), it renders the Defendant's purported security interest in the Premises subject to attack under 11 U.S.C. § 544(a). *See Capital Center, supra,* 137 B.R. at 608-10; and *Rice II, supra,* 133 B.R. at 725-28.

Finally, the Defendant resorts to arguing that the transfer, even if avoidable under § 547, should not be avoidable by Posoff, as he was a party to the 1985 transaction. This argument, however, merely reflects the observation, appearing in *Capital Center,* 137 B.R. at 609-10; *In re Rice,* 126 B.R. 189, 192, 194, 195 (Bankr.E.D.Pa.1991) ("*Rice I* "); and *In re Aikens,* 94 B.R. 869, 872 (Bankr.E.D.Pa., *aff'd sub nom. In re Aikens v. City of Philadelphia,* 100 B.R. 729 (E.D.Pa.), *aff'd sub nom. McLean v. City of Philadelphia,* 891 F.2d 474 (3d Cir.1989), that a debtor standing in the shoes of a trustee can achieve results which that same debtor could not obtain if proceeding in his own right. However, the Debtors here *are* proceeding under 11 U.S.C. § § 522(g)(1), (h), 547(b), in the shoes of the Trustee.

***3** This leads into consideration of the final issue raised by the Defendant, *i.e.,* whether the Debtors are entitled to proceed in the shoes of the Trustee under 11 U.S.C. § § 522(g)(1), (h) because the Mortgage transaction was not "involuntary." The Defendant appears to argue that, since the execution of the Mortgage in 1985 was a "voluntary" act of Posoff, creating a consensual lien, the Defendant's 1992 recordation of the Mortgage was not an involuntary act.

We disagree. The act which effected the transfer, *i.e.,* the recordation of the Mortgage, was not only not a voluntary act of the Debtors, it was not an act of the Debtors at all. Rather, it was an act performed by the Defendant. As such, it clearly fell within the scope of § 522(g)(1)(A) and, concomitantly, § 522(h). *See Deel Rent-A-Car, Inc. v. Levine,* 721 F.2d 750, 752-54, 757-58 (11th Cir.1983) (the sole authority cited by the Defendant on this point, which supports the adverse position that the instant use of § § 522(g)(1), (h) is proper); *Rice II, supra,* 133 B.R.

at 728; and *Rice I*, 126 B.R. at 192. *Cf. In re Mason*, 69 B.R. 876, 881-82 (Bankr.E.D.Pa.1987) (even debtor's making of payment to a creditor in the preference period was deemed involuntary because it was made under pressure).

Since each of the three defenses raised by the Defendant cannot be sustained, and no other defenses appear to the court to be present, we will proceed to grant the Motion and enter judgment for the Debtors without the necessity of a trial.

ORDER

AND NOW, this 21st day of September, 1992, upon careful consideration of the Plaintiffs' Motion for Summary Judgment ("the Motion"), a supporting Memorandum of Law in this proceeding, and the Brief in opposition thereto filed by the Defendant, it is hereby ORDERED AND DECREED as follows:

1. The Motion is GRANTED.

2. Judgment is entered in favor of the Plaintiffs, RICHARD E. and SUSAN B. POSOFF, and against the Defendant, FRED D'IMPERIO.

3. The mortgage held by the Defendant against the residence of the Plaintiffs at 5 Apple Tree Court, Philadelphia, Pennsylvania 19106, is hereby AVOIDED pursuant to 11 U.S.C. § 547(b).

1992 WL 237405 (Bankr.E.D.Pa.)

END OF DOCUMENT

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

In Re: Case No. 03-47913
Chapter 13 Case

Larry J. Foster

Debtor(s).

DECLARATION OF LARRY J. FOSTER

I, Larry J. Foster, declare under penalty of perjury as follows:

1. I am the petitioner in this case, which is a Chapter 13 bankruptcy case. I make this affidavit primarily to discuss the circumstances, as I understand them, surrounding the mortgage that my wife took out against my home. I also want to clarify the situation regarding my tax debt to the IRS.

2. I am retired from Ford Motor Company on a disability retirement. In addition to receiving a retirement pension, I have been found disabled by the Social Security Administration.

3. I am the owner of a home at 8432 Dupont Avenue North in Brooklyn Park, Minnesota, where I have lived since about 1989. When I bought my home, I obtained a first mortgage that I believe is now held by Midland Mortgage Company.

4. From the periods of September 2000 to October 2001 and April 2002 to February 2004, I was serving sentences with the Minnesota State Department of Corrections. The first such period was for possession of a controlled substance, and the second such period was for having been an ex-felon in possession of a firearm. (I had been convicted eleven years before of felony possession of cocaine, which had been reduced after three years to a misdemeanor. The

Minnesota Court of Appeals found that the reduction of my sentence to a misdemeanor did not affect my disability from owning a firearm, so it upheld my conviction. Rather than continue a legal battle, I elected to turn myself in and serve my sentence in April of 2002.) I do not receive Social Security while I am in the custody of the Department of Corrections. I was released in February of 2004, but I am now housed at a treatment program in Golden Valley.

5. During the period of approximately December 2000 to October 2001, I was housed at the Minnesota Correctional Facility in Faribault, Minnesota.

6. On about January 2001, I was diagnosed with non-Hodgkin's lymphoma, a form of cancer that can be fatal.

7. At the time, I was engaged to Linda Kay Green-Jones.

8. My course of treatment went something as follows. I underwent surgery on about January 22, 2001 at St. Francis Hospital in Shakopee, Minnesota. I was kept at the hospital for about two to three weeks and then sent back to the Correctional Facility. My incision came loose, and I began to bleed internally and to gush other fluids. In about mid-February of 2001, I was sent for corrective surgery to St. Joseph's Hospital in St. Paul. There, additional surgery took place to open me up again, replace my incision, and clean up my infections. At St. Joseph's, I developed pneumonia. My lung was punctured as the hospital staff was attempting to reinflate my lung. I did eventually recover from these various surgeries. I have requested hospital records, but I have not yet received them.

9. During this period, I was suffering significant pain from the operations I had undergone, and I was receiving pain-relieving drugs that included morphine and Tylenol-3.

10. During this period, my pain and the drugs I was receiving limited my mental capacity and my powers of understanding and concentration. In addition, I thought I was going to die,

and this made it hard to focus on anything other than surviving.

11. During this period, on February 6, 2001, Ms. Green-Jones brought to me a Power of Attorney to sign. At the time, I was in the prison hospital at St. Frances, in serious pain, drugged, and extremely weak. Ms. Green-Jones told me that my family could have done anything it wanted with my body, if I were to pass away. I trusted her to care for what was done with my body, and she told me that the Power of Attorney would give her the power to do that, so I signed it. This was during the period when I was recovering from my first surgery.

12. This is the same Power of Attorney that is attached to the Trustee's motion objecting to the confirmation of my case.

13. Ms. Green-Jones selected the form that would be used as a Power of Attorney. I assume that the matters that are typed onto the form were typed at her request; I know that I did not specify the wording that was typed onto the form. I remember that Ms. Green-Jones had to help me to sign my name on the document, because I was so weak. I probably did not did enter my name or address and her name and address by hand. I do not know if the stamp from Mortgage Information Services was present on the Power of Attorney when I signed it. I do not remember who notarized my signature.

14. When I signed the Power of Attorney, my only intention was to give Ms. Green-Jones the ability to manage my affairs. I did not notice that the Power of Attorney said that she had the right to sell or mortgage my house. I certainly did not intend to give her that power at the time.

15. In about May 2001, Ms. Green-Jones and were married. She took my last name and since then has been known as Linda K. Foster.

16. I did not at the time of my marriage or thereafter, transfer an interest in my home to Linda K. Foster.

17. . I did not learn that the mortgage had been taken until about October or November of 2002. My wife made a comment about a house appraisal, and when I asked what she was talking about, she told me she had had to refinance the house. I learned that she had a significant gambling problem and serious gambling debts. I have since learned that Ms. Foster took out a loan for about $66,000 with Conseco Finance Company in June of 2002, and that she had pledged my house as collateral for the loan. The loan was taken out in her name alone, although my house was pledged as collateral, so I did not receive any of the proceeds or even know that any proceeds had been issued. At the time of the mortgage, I knew nothing of it.

18. I believe that as the result of errors in drafting or other errors, Conseco was not able to record the mortgage. In any case, I am informed that Conseco did not record the mortgage.

19. In about November 2002, I wrote a retraction of the Power of Attorney. In December 2002 that I resolved to put this into effect and sent it to Linda K. Foster and my attorney.

20. On or about February 28, 2003, Linda K. Foster filed for a Chapter 7 bankruptcy. In it, she discharged over $145,000 in consumer debt, including any personal obligation on this mortgage.

21. On another subject relevant to my case, I am aware that the IRS's current claim for priority taxes exceeds the amount that it would be paid in my Chapter 13 Plan. Its current priority claim stands at $7445.52. However, this includes "unassessed liabilities" or estimates for 2001 and 2002 taxes of $1,206 and $4,806 respectively, because I had not filed my taxes for these years. I filed these several weeks ago, and my attorney has just filed duplicate originals with the bankruptcy branch of the IRS—according to my returns, I am due a refund of $3,835 for 2001 and I owe $1,114 for 2002. Based on these corrected figures, I will file an objection to

the IRS's claim and I expect the IRS to withdraw its claim.

22. I am also aware that my current plan does not include enough payments to meet the "best interest of creditors" test of making payments equal to my scheduled non-exempt assets of $4,990. I have proposed a modified Plan paying $5,600 that would meet this test.

_____

Larry J. Foster

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the attached

Memorandum and
Affidavit

was mailed by First Class US Mail and transmitted by facsimile on the date set forth below to the following individuals addressed to each of them as follows:

Jasmine Z. Keller
Chapter 13 Trustee
310 Plymouth Building
12 South 6th Street, Suite 310
Minneapolis, MN 55402
FAX: 612-338-4529

US Trustee
1015 US Courthouse
300 South 4th Street
Minneapolis, MN 55415
FAX: 612-664-5516

James A. Geske
Wilford & Geske
7650 Currell Boulevard, Suite 300
Woodbury, MN 55125
FAX: 651-209-3399

Shapiro & Nordmeyer, LLP
7300 Metro Boulevard, Suite 390
Edina, MN 55439-2306
FAX: 952-831-4734

I declare under penalty of perjury that the foregoing is true and correct.

Dated: May 5, 2004

/e/ Randall Smith
Randall Smith
Attorney at Law

the IRS's claim and I expect the IRS to withdraw its claim.

22. I am also aware that my current plan does not include enough payments to meet the "best interest of creditors" test of making payments equal to my scheduled non-exempt assets of $4,990. I have proposed a modified Plan paying $5,600 that would meet this test.

Larry J. Foster